P. Gilles*

THE ELECTRONIC PROCESS AND THE PRINCIPLE OF ORALITY

The author examines correlation and realization of orality and writing in judicial proceedings. Electronic process development is critically estimated from the viewpoint of the named principles. Doctrine and practical aspects of principle of orality use are analyzed, prognosis of judicial proceedings development is made.

Key words: electronic process, orality, effectiveness, publicity, oral proceedings, writing proceedings

Three recent events illustrate the current prevalence of the topic. The first is the 2007 world congress of the International Association of Procedural Law (IAPL) at Salvador da Bahia, Brazil, which concerned the digitization of court procedures as one of the discussed modern reform tendencies. Additionally, the interim conference of the IAPL in Gandia, Spain in 2008 focused on the topic "Oral and written proceedings, efficiency in civil procedure". Finally, the colloquium of the 2008 IAPL in Pecs, Hungary dealt exclusively with the topic "Electronic Justice: Present and Future".

These and many other new discussions about electronic proceedings and oral proceedings in multiple jurisdictions have reanimated the older discussions about written proceedings and oral proceedings[1].

I. Preliminary Remarks

This report starts with some reflections on the title itself and its key and catchwords i. e. the "Electronic Process" on one side and the "Principle of Orality" on the other side.

1. Electronic Process

The phrase "electronic process" should not be understood only as a certain type of court proceeding or as related to court procedures as a whole. Instead, the phrase indicates a strong, ongoing worldwide movement embedded in fundamental reforms of justice systems and of the administration of justice and court procedures as well. The term "electronification" is more fitting than many other widely used expressions such as "computerization", "digitalization", "technicalization", or "virtualization"; the new name "electronification" fits better to other related terminology such as e-court, e-procedures, e-files, e-documents, e-signatures, etc., which refer to the ongoing introduction or intrusion and use of the so called "New Media", and in particular the tele-information and telecommunication techniques, (i. e. IT) in the realm of the judiciary regarding the judicative as the third power.

This development creates masses of legal problems in addition to practical and legislative problems which lead to many controversial discussions and debates. Quite often the discussions are focused on the contrast of oral proceeding with their counterparts in recorded (often electronically) proceedings. The result is often debate over whether an oral procedure would be preferable and more efficient than a written or an electronic process, and vice versa. For the average jurist, far from being an IT-expert, it is not so easy to approach the "electronic world" of today with limited knowledge and experience in this area. Most jurists almost certainly have and use technology including personal computers,

* Гиллес Питер (Gilles Peter) — доктор права, профессор Университета Гете (Франкфурт-на-Майне, Германия). E-mail: P.Gilles@jur.uni-frankfurt.de.

laptops, printers, and scanners. They have access to internet and intranets, search and find all kinds of information regarding data, send and receive e-mails and attachments, and operate index and findex and databases using only a small percentage of the available functions. A minority of them have probably some knowledge and experience also with internet video conferences, which would be more aptly named "audio video conferences" in our context and in regards to orality.

Yet all this represents only a very small sector of the huge and consistently growing IT world in which new discoveries and innovations are made not every month or week, but every hour and minute. Accordingly, the prognosis is that most or all of the currently used hardware and software will be obsolete and outdated within a few years. A simple jurist's commentary, in this face of this rapid, enormous and difficult to imagine electronic process, can only be, "Wait and see".

2. Principal of Orality

Returning to the conference title and the catchphrase "principle of orality", it seems at first glance that there is an overall consensus as to what this principal means. However, a normativistic, positivistic educated and trained jurist would have difficulties comprehending this principle to its full extent. In particular, if difficulties in comprehending the principle of orality occur because the principle of orality means a principle of informality, and this principle corresponds to the personal presence of court procedure participants through the directness and spontaneity of information and communication in the court room. The principle of openness and public exposure is apparent in court procedures as well.

For a convincing solution to this question about the full meaning of orality, we therefore need sociologists, psychologists, or other social scientists such as experts for conflict or communication theories or sociologies. What the jurists themselves can offer to explain this phenomenon of orality is often not much more than a declaration or explanation. A jurist might define orality as merely a transfer of information from one person to another one via "mouth to ear" by the help of words or language, or an interaction of speaking and hearing. Not only must the poor definitions of orality be criticized, but also its misunderstandings and dubious generalization.

Terminology such as "oral and written proceedings" mirrors and represents a leading procedural doctrine that divides and contrasts the supposed types of intra-court or extra-court proceedings: the "oral proceeding" on one side and its opposite, the "written proceeding" on the other side. Furthermore, a leading doctrine explains "orality" and "writing" as different forms of procedure. This raises the question as to whether oral speeches, disputes, debates, argumentations, pleadings, palavers etc., among persons involved in litigation, including the parties, lawyers, and judges, could really be called "proceeding" or a "procedure" since they are forms of conflict resolution. The reason that these may be misnomers is orality itself as a verbal expression is formless, and therefore the principle of orality is one of formlessness and, respectively, informality. This principle of orality is best examined in contrast to principles of formality like the traditional "principle of writing" related to the "written form", which is now supplemented or substituted by the modern electronic format as an extension of the written form.

To my knowledge, an entirely oral proceeding, particularly in the frame of civil justice systems, does not exist. Even if there are just oral judicial disputes about a legal case for conflict resolution reasons, as in the exceptional case of Thailand, there will be at the very end of the oral utterances at least a protocol, a written settlement, or a written judgment.

In contrast, one can find, not only historically but also in present times, many countries which predominantly use the written form in at least civil procedures, and we also can

find many countries which principally use written formats with some exceptional oral opportunities. The purely written form had been overwhelmingly predominant in Europe and elsewhere over the past centuries. The predominance also includes Germany, where the principle of writing had been practiced up to the year 1879.

Since then, the majority of the purported developed countries have some manifestation of both orality and writing as a hybrid, combination or an alternation of successions. In other words, they have court procedures with written as well as oral parts, elements or steps. Even so, the written elements as compared with the oral elements have become dominant according to the aptly turned Latin saying, *"Quod non est in actis, non est in mundo"*, meaning, "That which is not in the literature does not exist". This universal truth can be applied to highly formalized legal procedures worldwide.

The dominance of writing exists in spite of the fact that, for example, in Germany the *"mündliche Verhandlung"*, or "oral hearing", is the centerpiece of the entire process of civil litigation. However, the lawsuit or procedure itself is generally spoken just an outer form to channel the content of a legal case.

3. The Relation between Electronification and Orality

To conclude preliminary reflections on the title, this copula "and" connects the electronic process with the principle of orality. The anticipation — or even the fear — is that this powerful and, in my opinion, unavoidable and irresistible stormy movement will sooner or later lead to a setback, displacement, or total suppression of orality in the arena of court proceedings. The ultimate conclusion may be the abolishment of the principal of orality, or a victory of the written or electronic form in the ongoing competition between orality and the written or electronic format.

II. Electronification as Hyperformalization of Court Procedures

1. Formality and Formalization of Court Procedures

When talking about the formality of court proceedings, one should keep in mind the past period of the so called "formalization" of the civil procedure, its law, and its science. One may use the history of the development of civil procedural law and its scholarly treatment in Germany as an example. If one takes a glance at the history of the development of German civil procedural law, one must unfortunately say that, until a few years ago, there was a noticeable disregard of civil procedural law within the rankings and prestige scales of legal subjects and legal disciplines among the generally predominant opinion of the German jurists. The disregard was based in a large part on the widely-held misconception that civil procedural law (just as any kind of procedural law) has been characterized as a purely technical, practical, functional or formal branch of law. It has been seen as a mere accumulation of rules concerning forms, time limits, services of process, and technical measures. According to the leading opinion, this supposed formal law has to be or should have to be strictly distinguished from material respectively substantive law, namely the private law, which was and still is viewed as the "true" law and the only challenge of justice for judicial decision-making. Especially within the university education of jurists, civil procedural law has, for the most part, only played a secondary role as a mere appendix to civil law for decades.

In short, civil procedural law long has been considered to be a law of legal enforcement, i. e. an area of law that merely serves for the enforcement of subjective private laws; even today, this view often can be found in descriptions of the goal or purpose of civil procedure. It is also noteworthy that the representatives of the discipline also suffered for a long time from this undeniably naive perception of the fundamental character of civil procedural law and the resulting grossly false assessment of its qualities and functions.

Not infrequently, the representatives were blamed for "interest blind", "value neutral" or "nonpolitical" depictions of institutions, or for a legal doctrine "free of morals" in "a splendid isolation".

The period of formalization was followed by a period of "materialization", in which the substantive material and even constitutional values of the "formal procedural law" were discovered and recognized. The formalization period was criticized as resulting in a "hyperformalization" of civil procedure. The hyperformalization of civil procedure, can be observed today in many parts of the world, is characterized by the ongoing full or partial electronification of justice systems and court procedures.

2. Hyperformalism of Electronic Procedures

Caused by the current problems plaguing justice systems and boosted by the millennial turn's atmosphere of a totally "new era in the history of manhood", there is another tendency worthy of mention. This tendency also concerns the topics discussed herein, and it is described by the term "modernization". "Modernization" is a slogan often used by ministries of justice, legislators and politicians, especially in many justice reform projects and declarations about how to improve the efficiency of judicial administration by making court proceedings speedier, cheaper, better, or more attractive to the populace. However, when we look behind this term, there is not much more to detect than a mere punctual planned or already practiced introduction of the so called "modern media" or teletechniques like teleinformation and telecommunication to improve just the bureaucratic and organizational side of justice administration and just the technical, operational or processing side of court management and court procedures.

This tendency, which could be called "electronification" according to the same nomenclature as popular abbreviations like "e-justice", "e-procedure", "e-law", etc., is also named "virtualization", "digitalization", or "computerization" in reference to the sense of an ongoing permeation of the antiquated judicial administration, old-fashioned court office equipment, and outdated procedural behavior by incorporating new media and its potential.

Examining in particular the respective new "e-procedural-law" or "e-law of justice administration" (as in the German Judiciary Modernization Act of 2003 or the German Judiciary Communication Act of 2003) and at the new splinters of scattered single "e-norms" which simply have been slipped over certain provisions in the old Codes of procedural law (such as the German Civil Procedure Order of 1877), one gains the impression that all these legislative novelties concerned are offering little more than a new form — the "electronic form" — replacing or augmenting the usual traditional paper format or respectively the "written form" (both named "text form"), while their substantive content, use, and working processes remain unchanged.

Like all forms, the electronic form also has the function to preserve and to conserve its content. Therefore, the reform movement toward electronic format, which appears at first blush to be most progressive, is in reality an utmost *conservative*. It is conservative because this supposed modernization concerns nothing more than a change of format. It is insofar a mere "reform of the form", and not a reform of the content itself.

This substitution or enrichment of the traditional written form by the new electronic form, particularly in the field of information and communication, is found in e-registers, e-files, e-folders, e-documents, e-signatures, e-databanks or e-mails. These terms appropriately describe the replacement of one data storage media by another. In other words, the widely praised "modernization of justice" by the new media often means little more than the effort to replace or to augment the conventional form of actions, reactions and interactions of procedural or administrative working processes. Throughout Europe, however, the paper form is still predominant. This form is present in the terminology of procedural

law with words such as "register", "catalogue", "list", "document", "signature", "booklet", "docket", "writs", "writing", "file", "folder", "paper", "binder", "index", "certificate", "transcription", "copy", "protocol", "record", etc. Compared with this traditional paper form, the electronic form presents itself as an improvement over the conventional paper form, or as a "hybrid". Another electronic form that some countries have made plans to implement the imperfect supplementation of in-court "live" oral communications and negotiations (video conferences) by the use of real-time audio-visual transmissions in the courtroom. Changes such as these make the "modernizers" appear simply as "formalizers" who pay more attention to the format than the content which urgently needs reform. To illustrate in short the unalterable need for such a material or substantial modernization of justice, it is sufficient to know that business accountants and management consultants chartered by the German Ministry of Justice to analyze the present judicial realities were shocked by the inefficiency of the traditional court management and the court proceedings and by the immense waste of time, manpower and money. The research team found that court management suffered from circumstantiality, intricateness, formality, heaviness, slowness, costliness and complicatedness.

These factual deficiencies found out are to a big part raised by widely inflexible and obsolete legal over-regulation in the contemporary judicature acts and procedure codes, which — at least in Western Europe — often stem from the 19th century. Although more recently amended, enacted, or imported by one nation to another, they mostly are still deeply rooted in their foreign legal history and impose old patterns. With rare exceptions in regard to faintly modernized newer codes, the procedural codes predominantly can be described as outdated, retrospective and past-orientated, and therefore not truly "modern". Updated, prospective and future-orientated justice administration codes, court acts or procedural orders do not seem to exist.

Coming back again to the so called electronification of justice systems and court procedures, such as the movement toward totally "virtual" court procedures or "telecourts", it must be pointed out that this ongoing metamorphosis will be inevitably and irresistibly carried out, regardless of the doubts as to how necessary and actually useful the changes will be. Already this development creates severe theoretical and practical problems for the proceduralists. For example, the rapidly ongoing electronification of court procedures, accompanied by more and more so-called "e-procedure law", forces one to reconsider nearly all of the confided procedural principles such as the principle of accessibility, the principle of submission of facts and evidence (in modern terminology, "the principle of information"), the principle of negotiation (in modern terminology: "the principle of communication"), the principle of directness, the principle of presence of the participants, the principle of publicity, the principle of effectiveness, and others. We should recognize that the most important and significant part of court proceedings, despite the widely but not unanimously accepted principle of orality (i. e. formlessness), is that of the "file" or "paper" process. This file or paper process can described in modern terms as a "data processing system", an "information system", and a "communication system". As such, our old-fashioned court procedures, on one side, and the new world of teletechniques with its "electronic data processing", "teleinformation" and "telecommunication", on the other side, show a great deal of reciprocal attractions, affinities, and compatibilities. This makes it apparent that the court proceedings in particular and the judicial systems in general are fallow, open fields which will be conquered by the new media sooner or later. This still will hold true, even if it turns out that the fully electronic or partly electronically supported court procedures are not all faster, cheaper, and better than the old-fashioned ways. Additionally, we have to keep in mind the high costs for buying, installing, maintaining and updating both hardware and software, and furthermore the fact that, for example, by using e-mails, only the *information-transfer-*

speed can be reduced to split seconds, which does not mean at all that the proceeding as a whole (including hearings, deposition taking, negotiation, decision making, etc.) will become faster. Last but not least, one should consider the opinion of experts that a court procedure without any paper cannot truly exist. This opinion contains the option of a future "double-track" model, which certainly would not be cheaper and faster than a one-track procedure of the old or of a new style.

One more remark to finish this chapter: the ongoing legalization of judicial or procedural phenomena by the creation of e-justice or e-procedural norms also stands for a strong move, here called "*formalization*", towards a new quality of "formalism" in our procedural law. Procedural law is a field of law which has been long characterized as a "formal" or even formalistic field of law, neglecting all its material, substantial and even constitutional impacts and values.

III. Dominance of Written Form and Decline of Orality — the German as an Example

1. Written Proceedings and Oral Negotiation

Looking at the provisions of the German Civil Procedure Code (*Zivilprozessordnung*, or "ZPO"), we find in Book 1 stemming from 1877, named "General Provisions" of this codification, in Section 3 "Procedure", under Title 1 "*Oral Negotiation*" (*mündliche Verhandlung*) in the first paragraph (§ 128 I ZPO), the apodictic sentence: "The parties negotiate the legal dispute in the face of the adjudging court orally". The mere location of this paragraph makes it clear that at least the lawmakers themselves attached great importance to the oral negotiation as a communicative interaction between the litigating parties and only between the parties and/or their lawyers. Only if both parties agree, the court discretionary has the discretion to render a decision exceptionally "without an oral negotiation" (§ 128 II ZPO). If lawyers are involved in the trial, this oral negotiation must be prepared by preparatory writs (*vorbereitende Schriftsätze*, §§ 129,130 ZPO). These are apart from the initial written complaint (*Klageschrift*) of the plaintiff (§ 253 ZPO) and the defendant's subsequent written answer to the complaint (*Klageerwiderungsschrift*, § 277 ZPO) as decisive writs (*bestimmende Schriftsätze*). All these writs are practically the main sources of factual information for the court in particular.

According to a strict legal order (§ 272 ZPO), the legal dispute must be disposed principally in one comprehensive main hearing (*Haupttermin*) after its preparation either by an early first hearing (*früher erster Termin*, § 275 ZPO) or by a written pre-trial (*schriftliches Vorverfahren*, § 276 ZPO).

A relatively new section asks now for a mandatory "conciliation negotiation" (*Güteverhandlung*, § 278 II ZPO) aiming an amicable settlement of the dispute, which takes place directly before the beginning of the intrinsic controversial oral negotiation of the case. This is a new regulation, which in practice turned out be a legislative flop. Concerning the course of the negotiation the regulations are the following: the presiding judge must open, guide, and close the negotiation taking care of an exhaustive debate and complete argumentation of the case (§ 136 ZPO) before rendering a decision. The oral negotiation is started by the applications of the parties and their pleadings must be done in a free, ad-lib oral argument covering the litigation as a whole in all its factual and legal relations (§ 137 I, II ZPO). The parties are obliged to declare the factual circumstances completely and truly (§ 138 I ZPO), while the court has the duty — as far as required — to discuss the litigated subject, its factual as well as its legal side, to ask questions and to give advices and directions (§ 139 ZPO). Concerning the more detailed content of the oral negotiation, it is requested normatively that the parties deliver their statements in a timely manner. In particular, this pertains to statements related

to offense and defense, allegations and contradictions, objections, evidence and counter evidence. In other words, as early the promotion or expedition intending procedural case conduct (§ 282 ZPO) requires in accordance with the procedural situation. If a proof taking has taken place, the parties again have to negotiate concerning its results, and reconsider the dispute relations as a whole (§ 283 ZPO). Finally, the pronouncement of the judgment by reading the formula (§§ 310, 311 ZPO) also can be seen as an expression of orality.

Recognizing all these legal texts of the German Civil Procedure Code, one may gain a preliminary impression that in Germany orality plays a significant or even a dominant role in typical, full-fledged civil proceedings. However, all the regulations presented before are just text-law, paper law, or "law in the books", as the Americans would say, and not the living law, the law in action or the practiced law. In other words, the mentioned norms reflect just *idealities* and more rarely the *realities* of the German judicial and procedural situation regarding the actual condition ("*Istzustand*") and not the target state implied in the norms ("*Sollzustand*"). Besides, most of the quoted paragraphs deal more or less with orality, while the masses of provisions — out of which only a very few had been mentioned up to now — refer to writing or to the written form.

As previously discussed, German civil procedure primarily has the character of a "file process", a process of writs, or a paper process (*Aktenprozess*), an opinion which can be easily substantiated by the huge numbers of procedural norms and procedural phenomena dealing with the written or text form and which are indicators for the *principle of writing*. The most significant indicators are:

the initial written complaint (§ 253 ZPO) and the written answer to the complaint (§ 277 ZPO) as in constitutive or decisive writs as well as in preparatory writs (§§ 129, 130 ZPO) produced by the parties or their lawyers;

the written pre-trial for preparation of the main hearing;

the formal requirements for all types of judicial decisions, sentences, judgments, directives (*Urteile*), degrees (*Beschlüsse*), or orders (*Verfügungen*), particularly for the most important judgments (*Urteile*, §§ 313, 317 ZPO) and for those decisions which function as written conditions for execution, i. e. as in an executory title (*Vollstreckungstitel*) (§§ 704, 794 ZPO);

the requests for writing concerning the form and the content of judgments (§ 313 ZPO), their service, and executive copies (§ 317 ZPO). This also includes requests for the correction and additions of decisions (§§ 319ff ZPO);

the coercive demands of detailed protocols (§§ 159ff ZPO) relative to the whole negotiation and to each proof-taking and, in plain words, about all important actions, reactions, and interactions of the private, professional and official participants of the lawsuit;

the uncounted provisions, mentioning files (§§ 143, 168, 298, 299 ZPO) and documents (§ 131 ZPO), signatures, copies (§ 133 ZPO), writings, letters, excerpts, certificates, enclosures, binders, booklets, dockets, registers, catalogs, indexes, transcriptions, lists, protocols, records, titles, clauses, attachments, data storages, handwritings, holographs, notarizations, authentications, attestations, credentials, etc.;

the formal requirements for separate proof taking intra-court procedure, asking for an order for proof taking (*Beweisbeschluss* §§ 358, 359 ZPO);

the regulations about writs and protocol for proceedings at local courts (§ 496 ZPO);

certain types of non-oral special procedures such as document procedure, including bill procedure (*Urkunds- und Wechselverfahren* §§ 592ff ZPO);

the formalized proceeding for provisional judicial protection (*Arrest und einstweilige Verfügung* §§ 916ff ZPO).

Last, but not least, as a further practically immensely important special procedure, the payment order procedure (*Mahnverfahren* §§ 688ff ZPO), a procedure which is highly

formalized. The procedure is formalized in a way that is often automatic and mechanical and, more recently, also partly electronical. In this context, it is noteworthy that in Germany the estimated number of incoming payment order proceedings at local courts is about twelve million proceedings per year.

2. Writing as Reality, Orality as Ideality

Even the mandatory written elements of German civil proceedings are overwhelming in their quantity. Nevertheless, according to law, there is a respectable space left for orality. As already explained, the "oral negotiation" should be viewed as the central event, holding an exponent position in the whole CPO. Besides the main rule (§ 128 I ZPO), one can find more than one hundred provisions mentioning the "negotiation" (*Verhandlung*) or a "negotiating" (*Verhandeln*) in many respects and procedural relations. These terms always signify an "oral negotiation", which also holds more or less true for terms like "pleading" and "hearing" or other expressions, as well.

However, this ideal world of norms does not reflect and describe the real procedural practice, particularly not the full-fledged normal or ordinary first instance fact finding and law applying proceedings at the local courts (*Amtsgerichte*) and district courts (*Landgerichte*) as entrance courts. At these entrance courts today, the oral negotiation plays no longer plays a significant role in factual or normative reasoning. First of all, the entrance courts suffer from an extreme caseload or even overload in regard to circa 1.5 million incoming civil cases per year. This immense amount of work for the judges an courts in civil jurisdiction does not allow for extensive oral negotiation and oral argumentations on a case by case basis. It is mostly presented already in written form anyway, covering all factual and legal issues completely, as the law demands.

Besides, already since the amendments of the German CPO from 1909 and 1924, the parties and their lawyers are expressively permitted to refer to all their writs, delivered in advance (§ 137 III ZPO) during the judges' so-called "hearing" of parties' "speaking" — an opportunity extensively used and which is everyday court practice.

This possibility of referring to the written statement has been long weakened, and more and more the principle of orality severely weakened. Nowadays, this has resulted in accusations of the alleged orality of being a farce or myth, and criticizing the development as a decline or "downfall of the oral negotiation". An additional remark about the oral discussion should be made not only in regard to the factual side, but also to the legal side of the debated subject: there are judges who, in proceedings where lawyers voluntarily or coercively are involved, dislike or simply tolerate any of the lawyers' legal explanations as equally educated and trained legal experts. This judicial attitude and habitude corresponds with the old and questionable devise "*iura novit curia*", and no one else than the *curia*. Even in appellate proceedings at High District Courts (*Oberlandesgerichte*) and at the Federal Supreme Court (*Bundesgerichtshof*), where only the pure or a main legal control of the appealed decision is at stake, one may find occasionally such an approach among judges. This approach is far away from the idea of a legal cooperation among the experts in law during the stages of fact finding and law finding, while the final judgment is undoubtedly in the responsibility and autonomy of the judges alone.

3. Oral Information and Communications as Statutory Centerpieces of Civil Procedure

Orality, and especially the oral negotiation, is not only a debacle from a practical point of view, but also from a theoretical one for several reasons. The described destruction and devaluation of the principle of orality, particularly in regard to so "hearings", where the judge and — according to the principle of publicity — also an audience in the courtroom,

should hear, what the parties and their lawyers have to say based on the fundamental right of the litigants to be heard (Art. 103 GG) and the corresponding fundamental duty of the judge to lend them his ear. This is certainly caused by the two aforementioned circumstances:

There is, in the first place, the immense workload by the millions of incoming of civil cases at the civil courts every year and the respectable efforts of the judges to manage this load by huge amounts of disposals avoiding an increasing yearly backlog.

Then, there is the legal permission for the parties to refer to all their writing and writs to a large extent, replacing the original regulation, and asking the parties for comprehensive and complete oral presentations at the hearings.

The procedural scholarship must be blamed as well for the decline of the theoretically still praised principle of orality as an important characteristic among the amount of purportedly fundamental principles regarding basic maxims of civil procedural law. For nearly all German proceduralist, the immensely high value of private autonomy finds its expression in civil procedure in the "principle of parties' disposition" upon the course and subject of litigation (*Dispositionsgrundsatz*), and — most relevant for the here treated topic — in the "*principle of negotiation*" (*Verhandlungsgrundsatz*) which is equated with the "*principle of parties' submission of facts and evidence*" (*Beibringungsgrundsatz*) by the absolutely leading procedural opinion. These principles reflect the parties responsibility to introduce into the trial orally or in written form the relevant historical facts of the case in order to reconstruct the past factual situation ("truth finding") which caused the legal dispute. For most scholars and practitioners, both principles are identical and the different names are merely synonyms containing nothing more than the submission of facts and evidence. This way of thinking neglects or even completely ignores the aspect of negotiation. This equalization or identifying of the *Beibringungsgrundsatz* as an — in modern terms — "*principle of information*" with the *Verhandlungsgrundsatz* as a "principle of communication", absorbing the *Verhandlungsgrundsatz* by the *Beibringungsgrundsatz*, is a severe mistake with the consequence of a dogmatically cultivated ignorance about the oral negotiation. No wonder therefore, that — as far as known — in none of all the study books and commentaries on civil procedural law we will find any deeper definitions, descriptions and explanation, what *Verhandlung* in the true sense of this terminus could mean and should mean. Insofar, the *Verhandlungsmaxime* is not yet really discovered and developed.

4. Orality and Writing as Factors of Efficiency

When asking about the influences of orality and writing regarding the *efficiency* of court procedures, we often face the question as to whether oral proceedings are more efficient or less inefficient than written ones and vice versa. Such an indifferent question in all its generality does not make much sense and does not allow any profound answer.

First of all, one must clarify what it means when using the now ubiquitously used words "efficiency" or "effectiveness". These terms may contain aspects of quantity, as well as of quality, time span, workload, work management and manpower, duration, delay, acceleration and deceleration, resources, personal, facilities and equipment, costs and expenditure, of organization, structures and functions. Other aspects are more often embraced by catchwords like "economization", "rationalization", "rationing", "centralization", "concentration", or "simplification", or by reform slogans including "lean justice" and "lean procedure". If one examines reform efforts to make procedures more speedy and less costly, and reduces procedural "efficiency" to the question of whether a court proceeding is simple, cheap, and quick, these considerations lose reflections about the aims of court procedures in our times. The primary, but very difficult to achieve, purpose must be to render an as justifiable as possible expenditure, that means

the main purpose is to balance or "optimize" the several and partly contrary aims of a civil process. If this target is reached, the proceeding may be valued as "effective".

In this context, it is worth mentioning the outdated prejudice that written procedures, as compared with oral ones, are generally slow, heavy, circumstantial, and costly. This opinion is rooted in ancient court situations in which writs and files were handwritten or recorded using old-fashioned mechanical typewriting machines. However, in this new era of high-tech, multimedia, internet, electronics, and audiovisual equipment, written proceedings have the potential to be at least as speedy as litigation which is primarily oral. For example, in Costa Rica, where first instance civil proceeding had lasted on average about seven years, the justice system reformers since a decade have called for nothing else but for *Oralidad* as a *Gran Reforma* or a panacea to cure all the maladies of the written processes; this is a very illusionary reform approach. Furthermore, as already mentioned, most of the present civil procedures exist as a combination of both written and oral parts, and of phases or steps as possible "factors of efficiency". Therefore we cannot plainly ask if an oral procedure is more or perhaps less efficient than a written procedure. Instead, we must ask, which procedure in which oral-written-construction and course is more efficient than another one of this combination type.

When we want to avoid mere speculations, then this question can only be answered on the basis of empirical analyses and research, particularly research by sociologists and economists, revenue agents, business administrators, financial auditors, management consultants, specialists of business organization, etc. This research, as previously mentioned, had been done in Germany during the 1980s and was embedded in a huge project of the German Ministry of Justice called *Strukturanalyse der Rechtspflege* (SAR). The empirical results of that project unfortunately led to only very few legislative reforms of the German Civil Justice System. Meanwhile, many of the SAR-results have become outdated due to the introduction of electronic data processing, teleinformation, and telecommunication, which have started to conquer the justice administration systems and the court procedures, as well.

IV. Reasons for Defending and Saving and Causes for Attacking and Damaging the Principle of Orality

There are many good reasons to defend the principle of oralitiy against the negative influences of the ongoing electronification, and to save this principle in the realm of civil procedure in general and in the realm of labor procedure in particular. However, there are also plenty of causes as to why the principle of orality will be more and more endangered and finally perhaps eventually given up. In the following, the pros and cons can be presented only in a very sketchy way, using only catchwords to describe the positive aspects regarding the advantages of the principle as well as the negative aspects related to its disadvantages. The pros and cons will be listed without any comments, weighing and valuation, because my own approach to the fundamental question about orality versus written procedure is anyway not an "either-or" or a "neither-nor", but rather an "as well as".

1. Pros

Concerning the pros, we can read and hear:

orality is the indispensible, most important concretization of the fundamental human right to be heard;

orality is a condition and guaranty of the principle of publicity as an instrument of court control by the public;

orality is the best, easiest, and quickest way to reconstruct the historical factual situation of a case truly and completely;

orality makes a lawsuit quicker, cheaper, and more effective and economical because it requires less time, less costs, and less expenditures;

orality allows for direct information and communication between the official, professional, and private lawsuit participants, immediacy of actions, reactions, and interactions and spontaneity;

orality and its condition of presence of the participants and their "face-to-face" attendance creates an atmosphere or climate for voluntary conflict resolutions like consent, agreement or intra-court settlement.

This last aspect may be of special interest in case of labor proceedings, which not always but often deal with so called "personal conflicts" and not only "financial" ones, i. e. with conflicts in which individuals like employees are personally and emotionally engaged and involved, as in family law. Therefore the legislators have long installed "conciliation hearings" for negotiation (*Güteverfahren*) in labor and family court procedure regulations, and in Germany newly in the Civil Procedure Code, as well.

2. Cons

Concerning arguments against the principle of orality, we can read and hear:

in contrast to written form, orality does not take into account the limited brain capacities of judges for adaptation and remembering of broad and complex oral information;

orality offers too much publicity and too little privacy, intimacy, and confidentiality;

private and professional participants of law suits are losing interest in oral hearings and choose more and more written proceedings where the law offers them this alternative;

for middle class business people as the primary clients of civil court services and as "repeat players" and not as "one shooters", oral hearings means expending a vast of time, manpower and money, particularly when management or executives are involved and forced to show up personally at court;

orality means in general more and more costs and expenditures, intricacies, circumstantiality, inconvenience and trouble;

the common representation of private parties like employees by lawyers, legal advisors, representatives of organizations like those of trade or labor unions, shop committees, staff associations or work councils aggravate alternative conflict resolution during oral hearings;

the promoters of orality ignore the increasing incompetency of private parties in this day and age to articulate themselves orally, verbalize complex subjects, and to argue clearly and logically;

furthermore the growing poverty of speech and growing impoverishment of the own language particularly among the younger generation is neglected;

there is also a growing aversion against direct personal contact with courts and with judges face to face in a courtroom;

for those who enjoy and who are used to e-shopping, e-commerce, e-banking, e-conciliation, e-mediation, e-arbitration, e-diagnoses, or e-therapies, coming to court and joining an hearing means inconvenience;

finally, in our era of the new media, the principle of orality does not fit anymore to our electronified world. This has created a new cult of life and changing human behavior and customs, habitudes and attitudes, mentalities and emotions more deeply engrained than ever before.

V. Final Remarks

The differentiation of fact submission from negotiation respectively information from communication, in civil procedure is also necessary for a better understanding of the functions and effects of orality here and writing there: writing or the written form have always or

mostly a conserving, preserving, affirming, assuring or contesting function in concern of its content being the bearer of all kinds of information or — in a modern term — of "datas". In civil proceedings the writs of the litigants contain typically the contrasting standpoints of the parties, who contest their contrary positions like a modern kind of the old roman "litis contestatio". Insofar the written form documents mainly the adversary, contradictorial or confrontational character of a procedure or of certain of its phases.

In the contrast, orality in procedure and in the first place the legally ordered but practically neglected "negotiation" is always already by definition an oral one, because just the exchange of papers, the mailing and re-mailing or a correspondence could not be named a negotiation in the true sense of the word. Such a face to face negotiation stands not only for oral controversies and dispute ("streitige Verhandlung") but also for the approximation, clearing and compromising of the standpoints, for cooperation and compensation, for reconciliation and settlement ("gütliche Verhandlung") or in short for "communication" as an interaction between the parties and only between them.

When therefore judges full of pride, report about how many proceedings or how many parties they have negotiated or even settled, then this outing attests a great misconception of the role and the tasks of a judge, who himself is not a negotiating partner but at the most just a moderator or mediator.

In sum: all the justice-system reformers, who want to replace the existing "litigation culture" by a "reconciliation culture" should take care of the orality, the intra-court as well as the extra-court one.

Being aware of the orality and its denoted functions and effects, we may move to the question of its efficiency.

As the author of this contribution feels unable to summarize all the touched aspects of the discussed topic, just a very last observation to end with:

One should be aware of the fact that the described movement is to a far extent unavoidable and irresistible. Furthermore, the so called formalization or even "hyper-formalization" particularly of court procedures by the ongoing electronification is widely submitting and aggravating the *controversial, adversary* or *contradictorial style* of legal conflict resolution by litigation at courts. But there exists another contemporary very strong movement, which means a severe contrast to the movement just mentioned. This is the current fundamental worldwide movement, asking also in respect to intra-court procedures for "*reconciliation*" contra pure litigation, i. e. for much more oral and direct face-to-face *communication* and *cooperation* among parties, lawyers and judges, present in the court room. This challenging goal may also be described by the general title of the world congress of the International Association of Procedure Law at Gent, Belgium, in 1977 as the striving for a "*Justice with a Human Face*".

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